Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

MaryAnn Esteves,

Plaintiff,

-against-

James M. McAlpin and Grand AM Recreational Vehicles, Inc.,

Defendants.

Motion Sequence No.: 001; MG
Motion Date: 8/13/08
Submitted: 9/10/08

Index No.: 4309/2006

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Clerk of the Court

Upon the following papers numbered 1 to 15 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 10; Answering Affidavits and supporting papers, 11 - 13; Replying Affidavits and supporting papers, 14 - 15.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Maryann Esteves on February 23, 2003, at about 8:10 p.m. as a seat-belted, front-seat passenger in a vehicle operated by defendant James M. McAlpin and owned by defendant Grand Am Recreational Vehicles, Inc. ("Grand Am"). Defendant McAlpin admits he lost control of the subject vehicle while accelerating on the eastbound entrance ramp to the Sunrise Highway (Route 27) west of Hospital Road, in Patchogue, New York. The vehicle slid to the right and off the roadway, rolled over three times and landed in an upright position in the snow on the side of the roadway.

Plaintiff Esteves now moves for partial summary judgment on the issue of liability on the grounds that defendant McAlpin's alleged negligence was the proximate cause of the accident which caused her injuries and there are no material issues of fact relating to how the accident occurred. In support, the plaintiff submits, *inter alia*, a copy of the pleadings, the transcripts of deposition testimony of plaintiff and defendant McAlpin, the bill of particulars and a photo of the accident scene.

Plaintiff points to defendant McAlpin's deposition testimony that the weather had gone from an afternoon of mild temperatures in the mid-forties to an "extremely windy" and rapidly decreasing temperature after they left the mall, to a "below freezing" condition in the evening at the time of the accident. Defendant McAlpin stated that it had snowed a few days before and six to eight inches of plowed snow remained on both sides of the roadway. Further, defendant McAlpin stated there was a curve near the end of the ramp where the vehicle in front "slid a little bit sideways." Plaintiff further contends defendant McAlpin admitted accelerating to 50 miles per hour on the entrance ramp and then losing control of the vehicle near the end of the ramp, causing it to leave the roadway and roll over three times. Plaintiff claims the foregoing circumstances demonstrate *prima facie* negligence in defendant McAlpin's operation of the vehicle under the prevailing weather conditions at an imprudent speed, and his failure to operate the vehicle with reasonable care and under proper control.

It is well settled that a proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law with proof in admissible form sufficient to establish the lack of any material issues of fact (see, Alvarez v. Prospect Hospital, 68 NY2d 320, 324 [1986]; Winegrad v. New York University Medical Center supra; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, CPLR §3212 [b]; Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

Vehicle and Traffic Law § 1180 (a) provides that "no person shall drive at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing." Also, § 1180 (e) states that "the driver of every vehicle shall, consistent with the requirements of subdivision (a) of this section, drive at an appropriate reduced speed when approaching...and going around a curve...when traveling upon any narrow or winding roadway...and when any special hazard exists with respect to...traffic by reason of weather..."[1]

Here, the plaintiff has established a *prima facie* showing of negligence by defendant McAlpin

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[1] Subd. (e). L2004, c 211, §1 legislation rewrote the subdivision, but its changes are not pertinent to the present matter.

as McAlpin admits he accelerated the subject vehicle to fifty miles per hour and then lost control of it causing it to leave the roadway and roll over three times, thereby causing plaintiff's injuries (see Dudley v Ford Credit Titling Trust, 307 AD2d 911 [2nd Dept., 2003]).

In opposition, defendant McAlpin attempts to raise triable issues of fact by maintaining in his affidavit that the accident occurred "when my vehicle came into contact with ice" and that he "did not anticipate that there would be ice on the entrance ramp where the accident occurred." Thus he attempts to negate the allegations of negligence with the defense of a sudden and unforeseen occurrence not of his own making (see Martin v. Alabama 84 Trucking Rental, 47 NY2d 721, 722 [1979]). However, the only evidence proffered by defendants to show the road was icy was the affirmation of defendants' counsel and the affidavit of defendant McAlpin. Counsel's affirmation repeats the statements of asserted fact found in defendant McAlpin's affidavit, along with cited cases relied upon. Any statements of fact by counsel having no personal knowledge of the facts are not evidence and offer nothing more than hearsay (see Prince v. Accardo, 863 NYS2d 819, NY Slip Op 06975 [2nd Dept 2008]). Therefore, any statements by defendants' counsel are insufficient to establish material issues of fact (see Zuckerman v. City of New York supra).

Moreover, the statements by defendant McAlpin in his affidavit of September 8, 2008 contradict his prior statements made in the earlier sworn deposition of September 19, 2007. His deposition testimony indicates that he did not observe any snow or ice on the roadway both before and after the accident. Therefore, other than his later affidavit, there is no admissible evidence of the existence of any ice on the roadway which caused him to skid and lose control of the subject vehicle. Further, his initial deposition testimony indicated that the vehicle in front of him was at a curve near the end of the ramp, when it "slid a little bit sideways." His later affidavit elevated this particular testimony to the "vehicle began to slide." Nonetheless, defendant McAlpin's initial deposition testimony indicates that the weather had gone from an afternoon of mild temperatures in the mid-forties, to an "extremely windy" and rapidly decreasing temperature after they left the Mall, through a "below freezing" condition in the evening at the time of the accident. This contrasts with his later affidavit wherein he indicates that when he entered the vehicle just prior to the accident "the temperature was not below freezing." The earlier sworn deposition shows defendant McAlpin should have been alerted to the freezing weather conditions prior to the accident and driven accordingly. But his later affidavit changes his prior stance to give the impression it was "not below freezing" minutes before the accident. The Court concludes that defendant McAlpin's self-serving affidavit contradicted his earlier deposition testimony and was "clearly designed to avoid the consequences of h[is] earlier testimony by raising feigned issues" (see Zalko v. Sunrise Adult Health Care Ctr., 7 AD3d 616, 617 [2nd Dept., 2004]; Mestric v. Martinez Cleaning Co., 306 AD2d 449 [2nd Dept., 2003]), and this affidavit is deemed insufficient to raise a triable question of fact in the Court's determination.

The only remaining statement which points to the possibility of the existence of ice on the roadway is McAlpin's deposition testimony wherein he alleges a fireman at the accident scene stated the ramp was covered in ice. However, this statement standing by itself is hearsay and inadmissable

(see McCormick On Evid. §10 [6th Ed.]). It is well established that inadmissable hearsay is insufficient to raise any triable issues of fact to defeat a motion for summary judgment (see Schwartz v. Nevatel Communications Corp., 8 AD3d 469 [2004]; Siegel v. Terrusa, 222 AD2d 428 [2nd Dept., 1995]).

Even if defendant McAlpin were able to establish the existence of an icy roadway which caused him to skid off the roadway, McAlpin appears to counter the allegations of negligence through the defense of the common-law "emergency doctrine." However, in order to raise this doctrine, there must be a "threshold determination" that there is a "qualifying emergency" whereby the evidence supports a finding that the party was confronted by "a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration" (see Caristo v. Sanzone, 96 NY2d 172, 174-175 [2001], citing Rivera v. New York City Tr. Auth., 77 NY2d 322, 327 [1991]), or circumstances must show that the accident was unavoidable and could not have been foreseen by the exercise of reasonable caution (see Toss v. Randall, 279 AD2d 569 [2nd Dept., 2001]).

Defendant McAlpin states in his deposition testimony that the weather was very windy prior to the accident, the temperature had dropped below freezing and there was plowed snow, six to eight inches on the sides of the roadway. He accelerated to fifty miles per hour under these weather conditions. He states the vehicle in front of him "slid a little bit sideways" at the curve portion of the ramp. The evidence shows that the vehicle in front of defendant McAlpin's vehicle did not lose complete control on the same roadway being traveled by McAlpin. Defendant McAlpin's deposition testimony shows that he did not decelerate or brake prior to his vehicle's sliding and the resultant accident. Thus, the record establishes defendant McAlpin was traveling at an unreasonable and imprudent speed under the circumstances and did not comply with §1180 (a) of the Vehicle and Traffic Law. It also establishes that he did not reduce his vehicle to a reasonable speed while approaching a curve in the roadway under the existing weather conditions and did not comply with §1180 (e) of the Vehicle and Traffic Law. These actions demonstrate the accident was of his own making (see, Martin v. Alabama 84 Trucking Rental, 47 NY2d 721, 722 [1979]), was not sudden and unforeseeable, and did not meet the threshold requirements of a "qualifying emergency" (Caristo v. Sanzone, 96 NY2d 172, 174-175 [2001]). Nor did these actions demonstrate the accident was unavoidable and could not have been foreseen by the exercise of reasonable caution (Toss v. Randall, 279 AD2d 569 [2nd Dept., 2001]).

Therefore, as a matter of law, defendants have not met their burden to raise a triable issue of fact sufficient to necessitate a trial on the issue of liability (see Felderbaum v. Weinberger, 40 AD3d 808 [2nd Dept., 2007]; Dudley v Ford Credit Titling Trust, 307 AD2d 911 [2nd Dept., 2003]). "Mere conclusions, expressions of hope, allegations or assertions are insufficient to raise a triable fact issue" (Namisnak v. Martin, 244 AD2d 258, 259 [1st Dept., 1997]).

Under § 388 of the Vehicle & Traffic Law, the negligence of one who uses or operates a motor vehicle with the permission of the owner, is imputed to the owner. This section gives rise to

a "very strong" presumption that the vehicle is being operated with the owner's permission, but the presumption may be rebutted (see Murdza v Zimmerman, 99 NY2d 375, 380 [2003]; Britt v Pharmacologic Pet Serv., 36 AD3d 1039 [3rd Dept., 2007]). In his deposition testimony, defendant McAlpin admitted he was employed by Grand Am which owned the subject vehicle and also served as its President. Thus, the presumption that defendant McAlpin operated the vehicle with the implied consent of Grand Am has not been rebutted. Moreover, any negligence by of defendant McAlpin is therefore imputed to defendant Grand Am.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability is granted. Plaintiff is directed to serve a copy of this order with notice of entry upon defendants, and the Calendar Clerk of this Court is directed to place this action on the calendar for the Calendar Control Part (CCP), for the next available date for trial on the remaining issue of damages.

Dated: December 18, 2008

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.